SUPREME COURT, U. S.

# No. 884

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

RAY M. BENJAMIN, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, ET AL.,
Respondents.

G. D. FERGUSON, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, ET AL.,
Respondents.

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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## CITATIONS TO OPINIONS BELOW

The opinion of the Common Pleas Court sustaining a motion for judgment on the pleadings in the Ferguson case is printed in Appendix A hereto, infra, pp. 9-23. Said opinion has not been supplied by petitioners and is not reported in either the official or unofficial state reports.

## JURISDICTION

Respondents admit the jurisdiction of this court under 28 U. S. C., Section 1257 (3).

## QUESTIONS PRESENTED

1. Should the writ of certiorari issue in this cause, respondents agree with petitioners that Question 1 as presented on page 3 of petitioners' brief would be before the court.

2, 3, and 4. Even though the writ issue, respondents deny that Questions 2, 3 and 4 as presented on pages 3 and 4 of petitioners' brief would be before the court.

5 and 6. Should the writ issue, respondents agree with petitioners that Questions 5 and 6 as presented on pages 4 and 5 of petitioners' brief would be before the court except that references therein to Ordinances Nos. 156-53 and 157-53 should be deleted.

7. Even though the writ issue, respondents deny that Question 7, as presented on page 5 of petitioners' brief would be before the court.

## ORDINANCE INVOLVED

The only ordinance involved is No. 1615-54 (Volume 39, Columbus City Bulletin, p. 983), enacted by the council of the City of Columbus, Ohio, and printed in Appendix H, pp. 91-92 of petition for writ of certiorari.

## STATEMENT OF THE CASES

Respondents concur in the statement of the cases as printed on pp. 6-8 of petitioners' brief.

## REASONS FOR DENYING THE WRIT

1. The petitioners, in presenting those questions, which they deem to be raised by this case, have included in their brief questions 2, 3 and 4. These questions involve an interpretation of Ordinances 156-53 and 157-53. The respondents believe it to be extremely important that this court be alerted to the fact that neither 156-53 nor 157-53 are involved in the permissibility of the City of Columbus to prohibit pinball machines and in fact the questions became moot upon the passage of Ordinance 1615-54. To further explain the preceding sentences, it should be noted that Ordinances 156-53 and 157-53 attempted to regulate pin games by a licensing procedure, but the idea of licensing pin games was abandoned upon the passage of Ordinance 1615-54, which prohibited pin games entirely.

The respondents concede, for the sake of argument at this time, that there may be some federal questions involved in the interpretation of Ordinances 156-53 and 157-53, but inasmuch as these ordinances no longer affect the petitioners in any way, an answer by this court to the questions involved would merely be an abstract discussion of a hypothetical set of facts. The respondents wish to call the court's attention to *Ashwander v. T. V. A.*, 297 U. S., 288, and *Lee v. Bickel*, 292 U. S., 415, both of which held that the U. S. Supreme Court decides real controversies and does not discuss or give opinions to abstract or moot questions.

The petitioners have also raised the question of municipal police power to this court but the respondents contend that the Ohio Supreme Court in its decision of these cases, determined that municipal "police power" permitted Ohio municipalities is similar to the police power inherent in

the sovereign state. Therefore, this court cannot be concerned with the Ohio decision inasmuch as a decision of a state court of questions of state law is controlling upon the Supreme Court of the United States. *Memphis & C. R. Co. v. Pace*, 282 U. S., 241; *Greenaugh v. Tax Assessors*, 331 U. S., 486; *Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U. S., 358; *Morehead v. New York ex rel. Tipaldo*, 298 U. S., 587.

2. One of the principal reasons for the allowance of a writ of certiorari is that there exists in the various state courts throughout the nation a conflict of decisions. However, the conflict must relate not to the result reached in each instance, but to a conflict of principle.

Upon review of the decisions set forth in the petitioners' brief concerning the matter of conflict of decision, the petitioners had cited twelve decisions which they contend to be in conflict with the instant case. However, these cases are in regard to criminal prosecution of pinball operators under gambling statutes. Therefore, it is the contention of the respondents that no conflict exists, inasmuch as the real question involved in these cases is whether or not the police power is extensive enough to prohibit those businesses or occupations which have dangerous or evil potentialities. Two of the decisions cited by the petitioners, *Urban's Appeal*, 148 Super. Ct., 101 (Penn.) and *Couch v. State*, 71 Okla. Cr., 223, do not conflict with the Ohio decision even if this court would deem the principle involved to be the same, for in those cases the courts held that pinball machines came within the meaning of gambling devices and were therefore subject to criminal prosecution under the gambling statutes.

It should be pointed out again, however, that the cases before this court on the writ of certiorari do not concern the prosecution of pinball operators by virtue of a gam-

bling statute but whether an Ohio municipality has the right to prohibit pinball machines because of their dangerous and evil potentialities which is in fact an application of police power.

The respondents in their brief before the Ohio Supreme Court cited the three cases of *Calcutt v. McGeachy*, 213 N. C., 1 (1937); *Woodward v. City of Lithonia*, 191 Ga., 234 (1940); and *Dallman v. Kluchesky*, 229 Wis., 234 (1938), each of which dealt with the right of a political subdivision to absolutely prohibit pinball machines either on the basis of being gambling devices or potentially dangerous devices so as to come within the municipality's police power. In the fifth paragraph of the syllabus in the *Dallman v. Kluchesky* case, supra, the Supreme Court of Wisconsin stated that:

> "5. Although the common council of the City of Milwaukee cannot by a declaration in an ordinance, change the character of a nickel-in-the-slot machine so as to make it a gambling device when in fact it is not, the council can nevertheless declare, and in the ordinance in question has in effect declared, that such machines, when in certain locations, constitute a public nuisance. p. 178".

Further, the Supreme Court of Georgia held in part in the first paragraph of the syllabus in the case of *Woodward v. City of Lithonia*, supra, that:

> "1. * * * The ordinance adopted on May 6, 1940, provided that 'it shall be unlawful for any person, firm, or corporation to own, maintain, or operate any pinball machine or similar machine, including all machines operated by depositing a coin therein for the playing of a game or the engaging in of any contest of chance or skill' held, that the adoption of the ordinance was within the charter power of the municipality".

Therefore, the only logical basis for the decision in each of the above state courts, whether the court based its deci-

sion upon "public nuisance" or upon "charter powers" could ultimately be traced to "police power" which is in agreement with the Ohio Supreme Court decision that the "municipal police power" is sufficiently broad to extend to the prohibition of pinball machines due to their evil potentialities.

3. With no intent on the part of the respondents to fully argue the merits of the questions presented by the petitioners to the court, the respondents wish to present briefly at this time the question of police power and in what manner such power relates to "due process of law", "equal protection of the law", and the "obligation of contracts".

"Police power" in a general sense is the right of a political subdivision to protect the public health, morals, safety and welfare of its subjects. It is also an elastic thing which must ever be expanded or contracted to meet the always changing needs of the public. Such police power is proper so long as its exercise is not unreasonable nor arbitrary.

Whether the exercise of the police power is arbitrary or unreasonable is a problem dependent upon (1) the public need, and (2) the contravention of each person's basic right to pursue whatever vocation he may choose. In the event that the public need is such as to demand that certain activities be prohibited, then, and at that time, the right of the individual must of necessity be subservient to that public need and the enactment of a statute or an ordinance prohibiting the named activity is a reasonable exercise of the police power.

Whether or not a political subdivision may prohibit those things which have dangerous or evil potentialities is not a new question to this court. In the case of *J. L. Murphy v. California*, 225 U. S., 623 (1912), the United States Supreme Court held in the first paragraph of the syllabus

that the prohibition of billiard parlors by a municipality was a proper exercise of police power. In the Supreme Court decision in that case the court referred to certain language used in *Booth v. Illinois*, 184 U. S., 425.

In the *Booth* case, supra, Justice Harlan in his opinion stated at page 429 as follows:

> "The argument then is, that the statute directly forbids the citizen from pursuing a calling which, in itself, involves no element of immorality, and therefore, by such prohibition it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that subject, but is a clear unmistakable infringement of rights secured by the fundamental law."

As regards "due process", "equal protection", and "obligation of contracts" *Nebbia v. New York*, 291 U. S., 502, is a landmark case. In that instance the United States Supreme Court held that neither property rights or contract rights are absolute, and equally fundamental with either is the right of the public to regulate such rights in the common interest subject to constitutional restraints.

It is, therefore, the contention of the respondents that not only is there no conflict between the various state

court decisions, but the principle laid down by the *Murphy* case, supra, and the *Booth* case, supra, are in precise agreement with the decision of the Ohio Supreme Court in the cases now in question.

It is also the contention of the respondents that no reviewable federal question has been presented to this court because the mere contention that certain constitutional rights have been invaded when the questions involved have been settled by previous decisions of this court is insufficient ground for the allowance of the writ. *Utley v. St. Petersburg*, 292 U. S., 106.

4. The seventh question, in the petitioners' proposed questions to the court, states, in effect, that the Ohio Supreme Court refused to consider evidence placed before the trial court which tended to show that pinball games do not have evil potentialities.

In answer to the petitioners' contention, the respondents do not believe that there is any indication in the record of this case, nor in the decision of the Ohio Supreme Court which could possibly warrant such a conclusion. Further, it was held in the case of *U. S. v. Johnston*, 268 U. S., 220, that a writ of certiorari will not be granted by the U. S. Supreme Court for the purpose of reviewing evidence presented in the lower courts.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RUSSELL LEACH,
*City Attorney,*
*Attorney for Respondents.*

## APPENDIX A

### Opinion of the Court of Common Pleas

(Rendered this 19th day of July, 1954.)

Harter, J.:

*On defendants' motion, judgment on pleadings granted in favor of defendants; restraining order heretofore issued is dissolved; costs assessed against plaintiffs.*

This action was instituted March 26, 1953, for injunctive relief. While the defendants interpreted the prayer of the petition as seeking relief by way of "Declaratory judgment" in addition to the injunction, the petition is perhaps not actually susceptible to such an interpretation and counsel for the plaintiffs, in their briefs, disclaim any and all desire for a declaration of rights. Accordingly, there will be no attempt in this opinion to treat of any "Declaratory judgment" problems.

The injunctive relief sought was that defendants be "restrained from interfering with or molesting" plaintiffs (and certain parties with whom plaintiffs had contracts) in the ownership and operation of their "amusement games generally designated as *pin games*".

A description of these *games*, in the exact language of the pleadings is appropriate. It is alleged in the petition and admitted in the amended joint answer that "said games are operated or played upon an inclined board approximately two feet in width by approximately four feet in length, which said board is covered by a glass surface; that at various points on said board there are openings, plastic bumpers and metal pins, on and under which are printed numerals from 1000 up to 100,000; that on the lighted back-glass are printed scores from 10,000 to 9,000,000; that to operate said game the player inserts a 5*c*

piece in a flat metal slide or into a drop shoot which protrudes from the end of said game; that said player then pushes said metal slide into the interior of said game; that there is thereby automatically released and ready for consecutive play on said board a given number of marbles or balls, depending upon the location where the games are played; that by pushing a plunger inward or by manually pushing a puck or ball, one marble or ball at a time is projected upward and into a slot immediately in front of said plunger; that the player thereupon pulls said plunger back and releases it; that said plunger then propels the marble or ball forward up the incline into the field of play and that said marble or ball strikes various pins or bumpers or flippers, and rolls downward and falls into one of the various openings."

While the plaintiffs in their petition have made additional allegations regarding the number of balls available to each player for 5c being equal to all players; objects in scoring; no prizes nor "free plays" being given; and that "amusement only" is received by the player—such allegations are all denied generally by the amended joint answer, and such allegations will therefore be ignored, of necessity, for the purpose of this opinion. Under the law, only "agreed" facts may be considered at this stage of this litigation. Parenthetically, conclusions of fact or law, alleged in the petition and denied in the answer may, of course, be ignored as having no significance at this stage of this litigation.

To point-up the respective theories of the parties to this litigation, it is, we believe, appropriate that we quote from the temporary restraining order which plaintiffs induced one branch of this court to sign on the day the action was commenced. That order contains the language of the plaintiff's counsel. By it a temporary restraining order

was allowed against the defendants, "as prayed for in the petition, so long as the pin games described in the petition are played *for the purpose of amusement only*, and so long as the players thereof do not win or receive, directly or indirectly, any merchandise, cash, checks, tokens, free-plays, or anything of value as a prize or reward for playing any of said pin games. In the event that any of said pin games are played *as gambling devices*, i.e. in the event that any merchandise, cash, tokens, checks, free-plays or anything of value is won or received, directly or indirectly, by the player as a prize or reward for playing any of said pin games described in the petition, or played as gambling devices in any way, the defendants shall be permitted to seize them whenever they are so played and to destroy them in accordance with law."

It is quite significant, as we see it, that plaintiffs' counsel have, in effect, thus injected their whole theory of gambling and these pin-game devices into the language of this restraining order; it is equally significant, as we see it, that the defendants have an entirely different theory regarding these pin-game devices, and do not deem the giving of prizes or "free plays" or the equality among players (in short, the "amusement only" phase of the case) as vital or material. While the attorneys for the defendants had no part in the choice of the language used in the temporary restraining order, they, in effect, did emphasize their view on this part of plaintiffs' theory by denying generally the allegations of the petition dealing with these problems in their joint amended answer, as explained above.

With this as the background, we believe we can succinctly state the issue of law presented by this motion for judgment on the pleadings as follows:

Should a court exercise its extraordinary injunctive powers to restrain police and city authorities from seizing and destroying the devices heretofore described even though they are, in practice, admittedly used for the purpose of amusement only (not gambling) under an ordinance, validly enacted, which condemns "any machine, device, instrument, apparatus or contrivance *which tends to encourage gambling* or which registers odds or a score, or *which is adapted*, or may *readily be converted* into such machine, device, or instrument that is adapted, for use in a manner violative of Sections 29.38-1, 29.40, 29.42, 29.42-1 and 29.42-2" of the ordinances of the City of Columbus?

We wish to emphasize the italicized phrases of the pertinent ordinance—"which tends to encourage gambling", "which is adapted" and "may readily be converted." In other words, *actual* use for gambling is not a prerequisite; "tending to encourage" and permissive use or possibility of, or adapting for, use, creates the test under the language of the ordinance. The quotation is from Ordinance No. 157-53 as enacted March 9, 1953, by the council of the City of Columbus.

Quite obviously from the language of the temporary restraining order (as prepared by counsel for the plaintiffs) and the repeated assertions contained in the briefs of the attorneys for the plaintiffs, the plaintiffs agree fully that pin-games which are actually used for "gambling" (with all the niceties of meaning of the term "gambling" which have been recognized by the courts through many years) are validly prohibited by the ordinances of the City of Columbus. It is only as to "amusement only" pin-games that plaintiffs can be said to be asking relief from the ordinances.

We, however, are of the opinion that pin-games which merely *tend to encourage* or *stimulate* the *gambling* in-

stinct are in such contravention of sound public policy that they may be condemned by an ordinance which validly exercises the police power of a municipality.

In this connection, we can quote from an Ohio Supreme Court case which summarizes our view and applies here as binding precedent: From Myers v. City of Cincinnati (1934) 128 Ohio State 235, 190 N. E. 569, we quote from page 238D:

> "Generally, the power of municipalities to enact and enforce police regulations within their boundaries is only limited by general laws in conflict therewith. Article XVIII, Section 3, Constitution of Ohio; 8 Ohio Jurisprudence, 347 et seq., 28 Ohio Jurisprudence, 101.
>
> "The constitutional provisions relied upon by plaintiff in error protect the citizen in his right to pursue any lawful business, but they do not prohibit legislation intended to control pursuits which because of their nature have injurious and harmful possibilities. Even if the slot machine involved in this case is manufactured and intended for lawful operations, its potentiality and design is such that it may be easily put to unlawful use. The regulation or prohibition of such a mechanism need not be postponed until such event occurs. This principle is expounded and applied in the following authorities:
>
> "Murphy v. California, 225 U. S., 623, 56 L. Ed., 1229, 32 Sup. Ct., 697; City of Burlingame v. Thompson, 74 Kan., 393, 86 P., 449, 11 Ann. Cas., 64; City of Shreveport v. Dale, 149 La., 439, 89 So., 408; 6 Ruling Case Law, 220 et seq.
>
> "The city has the right to determine whether the exhibition, maintenance and operation of slot machines as defined in the ordinance are prejudicial to the public good. 8 Ohio Jurisprudence, 408."

Problems such as those here present may frequently be pointed-up by consideration of extreme cases. The case cited in the foregoing Ohio Supreme Court opinion, Murphy v. California, is such an extreme case. There billiard and pool halls were prohibited by a city ordinance.

That ordinance's constitutionality was challenged and the case went through to the United States Supreme Court in 1911 where the law was upheld. An extensive quotation from that opinion is appropriate here because it disposes of so many of the contentions presently advanced on behalf of the plaintiffs on both the "constitutional law" and "procedural law" phases of this case.

> "In 1908 the city of South Pasadena, California, in pursuance of police power conferred by general law, passed an ordinance which prohibited any person from keeping or maintaining any hall or room in which billiard or pool tables were kept for hire or public use, provided it should not be construed to prevent the proprietor of a hotel using a general register for guests, and having twenty-five bedrooms and upwards, from maintaining billiard tables for the use of regular guests only of such hotel, in a room provided for that purpose.
>
> "The plaintiff in error was arrested on the charge of violating this ordinance. His application for a writ of habeas corpus was denied by the Court of Appeals and Supreme Court of the State. In re Murphy, 8 Cal. App. 440; 155 California, 522. Thereafter the case came on for trial in the Recorder's Court, where the defendant testified that, at a time when there was no ordinance on the subject, he had leased a room in the business part of the city, and at large expense fitted it up with the necessary tables and equipments; that the place was conducted in a peaceable and orderly manner; that no betting or gambling or unlawful acts of any kind were permitted, and that there was nothing in the conduct of the business which had any tendency to immorality or could in the least affect the health, comfort, safety or morality of the community or those who frequented said place of business.' This evidence was, on motion, excluded and testimony of other witnesses to the same effect was rejected.
>
> "The defendant was found guilty and sentenced to pay a fine, or in default thereof to be imprisoned in the county jail. The conviction was affirmed by the

Superior Court of the County, the highest court to which he could appeal. The case was then brought here by writ of error, the plaintiff contending that the ordinance violated the provisions of the Fourteenth Amendment, claiming, in the first place, that in preventing him from maintaining a billiard hall it deprived him of the right to follow an occupation that is not a nuisance per se, and which therefore could not be absolutely prohibited.

"The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations, which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted.

"Playing at billiards is a lawful amusement; and keeping a billiard hall is not, as held by the Supreme Court of California on plaintiffs application for habeas corpus, a nuisance per se. But it may become such; and the regulation or prohibition need not be postponed until the evil has become flagrant.

"That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything which could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation. The ordinance is not aimed at the game but at the place; and where, in the exercise of the police power, the municipal authorities determine that the keeping of such resorts should be prohibited, the courts cannot

go behind their finding and inquire into local conditions; or whether the defendant's hall was an orderly establishment, or had been conducted in such manner as to produce the evils sought to be prevented by the ordinance. As said in Booth v. Illinois, 183 U. S. 425, 429:

> 'A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.'

"Under this principle ordinances prohibiting the keeping of billiard halls have many times been sustained by the courts. Tanner v. Albion, 5 Hill. 121; City of Tarkio v. Cook, 120 Missouri, 1; City of Clearwater v. Bowman, 72 Kansas, 92; City of Corinth v. Crittenden, 94 Mississippi, 41; Cole v. Village of Culbertson, 86 Nebraska, 160; Ex parte Jones, 97 Pac. Rep. 570.

"Indeed, such regulations furnish early instances of the exercise of the police power by cities. For Lord Hale in 1672 (2 Keble, 846), upheld a municipal by-law against keeping bowling alleys because of the known and demoralizing tendency of such places.

"Under the laws of the State, South Pasadena was authorized to pass this ordinance. After its adoption, the keeping of billiard or pool tables for hire was unlawful, and the plaintiff in error cannot be heard to complain of the money loss resulting from having invested his property in an occupation which was neither protected by the state nor the Federal Constitution, and which he was bound to know could lawfully be regulated out of existence.

"There is no merit in the contention that he was denied the equal protection of the law because, while he was prevented from doing so, the owners of a certain class of hotels were permitted to keep a room in which guests might play at the game. If, as argued, there is no reasonable basis for making a distinction between hotels with 25 rooms and those with 24 rooms or less, the plaintiff in error is not in position to complain, because not being the owner of one of the smaller sort, he does not suffer from the alleged discrimination.

"There is no contention that these provisions, permitting hotels to maintain a room in which their regular and registered guests might play were evasively inserted, as a means of permitting the proprietors to keep tables for hire. Neither is it claimed that the ordinance is being unequally enforced. On the contrary, the city trustees are bound to revoke the permit granted to hotels in case it should be made to appear that the proprietor suffered his rooms to be used for playing billiards by other than regular guests. If he allowed the tables to be used for hire he would be guilty of a violation of the ordinance and, of course, be subject to prosecution and punishment in the same way, and to the same extent, as the defendant."

As a passing comment on this opinion, it was pointed out in this case quite significantly that the ordinance there in question was not aimed at the *game* but at the *place*—i.e. the keeping of a "resort". If such a purpose was there upheld, it is quite obvious that a public policy aimed at a device which potentially might be, or become, a gambling device would have an even sounder basis for exercise of police power. As recognized by the United States Supreme Court, there is no necessity for postponement of the exercise of police power until the evil has become flagrant—i.e. here, until the gambling actually is taking place on the pin game.

The basic problems of law involved in the present litigation have been considered by the Ohio courts in various

kinds of cases. Two closely parallel cases have been decided in recent years; in one, a *replevin* action was brought by the owner of a pin game against the Cleveland chief of police after that plaintiff's pin games, which were admittedly not actually used for gambling currently, had been seized under a city ordinance much like our own Columbus ordinance. In that case, plaintiff's relief by way of replevin was refused. The case was taken to the Ohio Supreme Court where the appeal was dismissed on the ground that no debatable constitutional question was presented. We refer, in this connection to the case of Zellas et al. v. Matowitz (1941) 8 Ohio Supp. 66, 22 Ohio Opinions 261 )appeal dismissed: 139 Ohio State 627, 41 N. E. (2d) 708).

In the second recently decided case, the plaintiff sought to enjoin the chief of police of Cincinnati from interfering with or confiscating his "Novelty merchantmen digger" machines. The issue was raised on a motion for a preliminary injunction. Evidence was not actually taken; the matter was argued and the court observed the plaintiff operate his machine some twenty times. The court refused the preliminary injunction. No appeal appears to have been taken from Judge Mack's decision there. The opinion is, however, particularly significant because it was rendered in an injunction suit, just like the present suit. Many of our procedural problems were there dealt with even though the machine or device there involved was quite different from the pin-game machines or devices here involved.

It would, of course, be appropriate for us in this opinion to quote extensively from these two opinions (particularly the Cleveland case, because the Supreme Court's ruling in finding no debatable constitutional question involved in it makes that case, in effect, a binding precedent on us insofar

as the constitutional question is concerned) but we doubt if any truly useful purpose would be served by our doing so. Rather, we choose to adopt the reasoning of those two cases here and refer the interested parties to those opinions for an amplification of the theories, as applied to facts closely parallel to our present facts, of the "substantive", as well as the "procedural", law dealing with this case.

In concluding that the injunctive relief which plaintiffs here seek should be denied, we are, we believe, following the precedents which have prevailed here in Franklin County for many years. Judge Randall of our Franklin County Common Pleas Court rendered an exhaustive, persuasive opinion on this general subject in the case of Snyder et al. v. McCune et al. (1931) 28 Ohio Nisi Prius Reports (new series) 506. In that opinion, Judge Randall carefully explained why injunctive relief should be refused in a case of this kind, basing his opinion on several unreported Court of Appeals and United States District Court opinions (from which he quoted extensively). We choose to follow his reasoning in that opinion without restating or paraphrasing it in this opinion.

The plaintiffs rely upon the decision of Judge Charles Bell of the Hamilton County Common Pleas Court in a 1953 case, entitled Westerhaus Company Inc. v. City of Cincinnati, et al. No. A-129385 in that court. In that case, a declaratory judgment was sought; an ordinance authorizing confiscation and destruction of amusement devices of the pinball type (so constructed as to make possible, either directly, or by adjustment, the return of cash or free-play or other privileges) was being challenged; there was no claim made there that there had been any "pay-off" of money or other tangible personal property on the pin-

ball machines in question; indeed, there, as here, the "amusement only" phase was apparently admitted by all parties. Judge Bell stated the issue which he was considering thus:

> "* * * the main question presented is whether 'free play', ipso facto, constitutes the devices involved herein as gambling devices per se. If the devices are not gambling devices per se, or are not being used for gambling purposes, then neither the Statutes of Ohio nor the Ordinance of the City of Cincinnati are being violated."

Again, to use Judge Bell's language:

> "This case, therefore, must be resolved by a determination of the question whether the operation of these devices violate any state statute."

We have no question regarding the soundness of Judge Bell's decision in his Hamilton County case; we do say, however, that the issue before him differed radically from the issue now being considered. We believe the foregoing quotations from his opinion conclusively demonstrate that difference. We are considering the extent of the police power of a municipality under *constitutional* limitations; Judge Bell was considering *statutes*, not the constitution.

Counsel for plaintiffs contend that, because the City of Columbus had licensed pin-games and recognized their legality until the present ordinance was passed, there should be a type of "estoppel" against such a change of position. We do not so understand the law. We believe a legislative body *can* change its position effectively and we believe the United States Supreme Court decision in the case of Murphy v. California, supra, explains the how and why of the constitutional law phases of such a problem.

Another contention advanced on behalf of plaintiffs is that the ordinances under attack contain phrases which are so "vague, indefinite and uncertain as to constitute a denial of due process of law." We do not agree. The answer to this contention, and to the further plaintiffs' contention to the effect that there has been an unlawful delegation of judicial and/or legislative power to administrative officers in these ordinances, is found in the theories so ably explained by Judge Reynolds in a case in our Common Pleas Court which went through to the United States Supreme Court recently, being affirmed all the way. We refer to the case of Motors Insurance Corporation v. Robinson, Superintendent (1951) 62 Ohio Law Abstracts 58, 106 N. E. (2d) 572. (Review denied, 344 United States 900.)

Standards, of course, must be laid down by the legislative branch of government but application of those standards may be an administrative act. The courts will, of course, review any claimed abuse of discretion by the administrative officer. See syllabus 8 and 9 of the Motors Insurance Corporation case, just cited.

While plaintiffs complain of a denial of equal protection of the laws, they admit that there may be reasonable classification. We believe there is reasonable classification here and that this litigation does not afford a suitable vehicle for challenge of any unfairness in enforcement. Arguments, and a decision in this field are moot and academic here. A true controversy on established facts is not present on this phase of the case. These observations are not intended, however, to suggest that *evidence* might be appropriate *in this case* on this point; rather, we mean to say that this issue cannot possibly come into the framework of this litigation.

Counsel for the plaintiffs have cited several Ohio cases squarely holding that injunctive relief may be sought and granted against criminal prosecutions where the law attempted to be enforced is unconstitutional and void and its enforcement will result in irreparable injury to vested property rights. We agree whole-heartedly with that rule of law but it simply is not applicable here; we hold the ordinances here under attack *are* constitutional and are *not* void. Quite obviously, therefore, the cases cited have no application.

Counsel for plaintiffs have referred in their briefs to a decision rendered by this branch of this court in January of this year in an appeal by one Phillip Gold from the Board of Liquor Control. That Gold decision was one of several rendered by this branch of this court to the effect that it was the duty of the legislature to prescribe workable standards for application by administrative officers. If no such standards are laid down, the administrative officers cannot fill the gap by exercising their own discretion. We still believe the Gold decision was right and, if it had any true application to the facts present in this pin-game controversy, we would be most willing to apply it here. We feel, however, that the standards for pin-games have been adequately defined in the challenged ordinances by the city's legislative branch and, therefore, the basic rule of the Gold opinion is not in point.

This branch of this court is fully aware of the fact that there are close shadings in the decisions of the courts in this area; we, personally, believe that, in general, "that government governs best which governs least"; we regret that ordinances such as those here under attack are deemed necessary. *But* we do not have power to substitute our judgment on questions of legislative policy for the judg-

ment of the Columbus city council. Our assignment, as a judge sitting in review of the constitutionality of ordinances is a limited, technical one:—we must inquire whether the constitutional guarantees afforded all citizens have been met and satisfied by the ordinances. Our conviction is strong here to the effect that the present ordinances are valid and enforceable.

Joseph M. Harter,
Judge.